

AMENDED IN ASSEMBLY APRIL 20, 2015

AMENDED IN ASSEMBLY MARCH 26, 2015

CALIFORNIA LEGISLATURE—2015–16 REGULAR SESSION

**ASSEMBLY BILL**

**No. 1423**

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**Introduced by Assembly Member Mark Stone**

February 27, 2015

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An act to add Section 2604 to the Penal Code, relating to medical treatment of prisoners.

LEGISLATIVE COUNSEL'S DIGEST

AB 1423, as amended, Mark Stone. Prisoners: medical treatment.

Existing law provides for the designation and selection of health care surrogates, and for the manner of making health care decisions for patients without surrogates.

Existing law prohibits the administration of psychiatric medication to an inmate in state prison on a nonemergency basis without the inmate's informed consent, unless certain conditions are satisfied, including, among other things, that a psychiatrist determines that the inmate is gravely disabled and does not have the capacity to refuse treatment with psychiatric medication. Existing law authorizes a physician to administer psychiatric medication to a prison inmate in specified emergency situations.

This bill would, except as provided, establish a process for a licensed physician or dentist to file a petition with the Office of Administrative Hearings to request that an administrative law judge make a determination as to a patient's capacity to give informed consent or make a health care decision, and request appointment of a surrogate decisionmaker, if the patient is an adult housed in state prison, the

physician or dentist is unable to obtain informed consent from the inmate patient because the physician or dentist determines that the inmate patient appears to lack capacity to provide informed consent or make a health care decision, and there is no person with legal authority to provide informed consent for, or make decisions concerning the health care of, the inmate patient. The bill would require the petition to contain specified information, including, among other things, the inmate patient's current physical condition and a description of the health care conditions currently afflicting the inmate patient.

This bill would require that the petition be served on the inmate patient and his or her counsel, and filed with the office, as ~~provided inmate patient.~~ *provided*. The bill would also require that the inmate patient be provided with counsel and a written notice advising him or her of, among other things, ~~the~~ *the inmate patient's* right to be present at the hearing. Except as specified, the bill would require that the inmate patient be provided with a hearing before an administrative law judge within 30 days of the date of filing the petition. In case of an emergency, as defined, the bill would authorize the inmate patient's physician or dentist to administer a medical intervention that requires informed consent prior to the date of the administrative hearing and would require that counsel for the inmate patient be notified by the physician or dentist. The bill would require the administrative law judge to determine and provide a written order and findings setting forth whether there has been clear and convincing evidence that, among other things, the inmate patient lacks capacity to give informed consent or make a health care decision. If the findings required by these provisions are made, the bill would require the administrative law judge to appoint a surrogate decisionmaker for health care for the inmate patient, as provided, which would be valid for one year and would be valid at any state correctional facility within California. The bill would also provide for a process to renew the appointment of the surrogate decisionmaker. The bill would authorize the Secretary of the Department of Corrections and Rehabilitation to adopt regulations as necessary to carry out these provisions.

Vote: majority. Appropriation: no. Fiscal committee: yes.  
State-mandated local program: no.

*The people of the State of California do enact as follows:*

1 SECTION 1. The Legislature finds and declares all of the  
2 following:

3 (a) In recognition of the dignity and privacy a person has a right  
4 to expect, the law recognizes that adults housed in state prison  
5 have the fundamental right to control decisions relating to their  
6 own health care, including the decision to have life-sustaining  
7 treatment withheld or withdrawn.

8 (b) The determination of capacity for informed consent for  
9 adults housed in state prison is more appropriately conducted at  
10 the institution where the patient is housed and can attend, if he or  
11 she desires.

12 (c) Because of the confinement of these adults and their frequent  
13 movement between institutions, existing protections for patients  
14 regarding health care decisionmaking are inadequate.

15 (d) Existing statutory schemes centered on life-threatening  
16 emergent illness and court-ordered decisionmakers do not  
17 adequately address the needs of adults housed in state prison to  
18 have their capacity issues addressed and adjudicated by a neutral  
19 third party, even in the absence of a serious or life-threatening  
20 medical emergency.

21 SEC. 2. Section 2604 is added to the Penal Code, to read:

22 2604. (a) Except as provided in subdivision (b), an adult  
23 housed in state prison is presumed to have the capacity to give  
24 informed consent and make a health care decision, to give or revoke  
25 an advance health care directive, and to designate or disqualify a  
26 surrogate. This presumption is a presumption affecting the burden  
27 of proof.

28 (b) (1) Except as provided in Section 2602, a licensed physician  
29 or dentist may file a petition with the Office of Administrative  
30 Hearings to request that an administrative law judge make a  
31 determination as to a patient's capacity to give informed consent  
32 or make a health care decision, and request appointment of a  
33 surrogate decisionmaker, if all of the following conditions are  
34 satisfied:

35 (A) The licensed physician or dentist is treating a patient who  
36 is an adult housed in state prison.

37 (B) The licensed physician or dentist is unable to obtain  
38 informed consent from the inmate patient because the physician

1 or dentist determines that the inmate patient appears to lack  
2 capacity to give informed consent or make a health care decision.

3 (C) There is no person with legal authority to provide informed  
4 consent for, or make decisions concerning the health care of, the  
5 inmate patient.

6 (2) Preference shall be given to the next of kin or a family  
7 member as a surrogate decisionmaker over other potential surrogate  
8 decisionmakers unless those individuals are unsuitable or unable  
9 to serve.

10 (c) The petition required by subdivision (b) shall allege all of  
11 the following:

12 (1) The inmate patient's current physical condition, describing  
13 the health care conditions currently afflicting the inmate patient.

14 (2) The inmate patient's current mental health condition resulting  
15 in the inmate patient's inability to understand the nature and  
16 consequences of his or her need for care such that there is a lack  
17 of capacity to give informed consent or make a health care decision.

18 (3) The deficit or deficits in the inmate patient's mental functions  
19 as listed in subdivision (a) of Section 811 of the Probate Code.

20 (4) An identification of a link, if any, between the deficits  
21 identified pursuant to paragraph (3) and an explanation of how the  
22 deficits identified pursuant to that paragraph result in the inmate  
23 patient's inability to participate in a decision about his or her health  
24 care either knowingly and intelligently or by means of a rational  
25 thought process.

26 (5) A discussion of whether the deficits identified pursuant to  
27 paragraph (3) are transient, fixed, or likely to change during the  
28 proposed year-long duration of the court order.

29 (6) The efforts made to obtain informed consent or refusal from  
30 the inmate patient and the results of those efforts.

31 (7) The efforts made to locate next of kin who could act as a  
32 surrogate decisionmaker for the inmate patient. If those individuals  
33 are located, all of the following shall also be included, so far as  
34 the information is known:

35 (A) The names and addresses of the individuals.

36 (B) Whether any information exists to suggest that any of those  
37 individuals would not act in the inmate patient's best interests.

38 (C) Whether any of those individuals are otherwise suitable to  
39 make health care decisions for the inmate patient.

1 (8) The probable impact on the inmate patient with, or without,  
2 the appointment of a surrogate decisionmaker.

3 (9) A discussion of the inmate patient’s desires, if known, and  
4 whether there is an advance health care directive, Physicians Orders  
5 for Life Sustaining Treatment (POLST), or other documented  
6 indication of the inmate patient’s directives or desires and how  
7 those indications might influence the decision to issue an order.  
8 Additionally, any known POLST or Advanced Health Care  
9 Directives executed while the inmate patient had capacity shall be  
10 disclosed.

11 (10) The petitioner’s recommendation specifying a qualified  
12 and willing surrogate decisionmaker as described in subdivision  
13 (q), and the reasons for that recommendation.

14 (d) The petition shall be served on the inmate patient and his or  
15 her counsel, and filed with the Office of Administrative Hearings  
16 on the same day as it was served. The Office of Administrative  
17 Hearings shall issue a notice appointing counsel.

18 (e) (1) At the time the initial petition is filed, the inmate patient  
19 shall be provided with counsel and a written notice advising him  
20 or her of all of the following:

21 (A) His or her right to be present at the hearing.

22 (B) His or her right to be represented by counsel at all stages  
23 of the proceedings.

24 (C) His or her right to present evidence.

25 (D) His or her right to cross-examine witnesses.

26 (E) The right of either party to seek one reconsideration of the  
27 administrative law judge’s decision per calendar year.

28 (F) His or her right to file a petition for writ of administrative  
29 mandamus in superior court pursuant to Section 1094.5 of the  
30 Code of Civil Procedure.

31 (G) His or her right to file a petition for writ of habeas corpus  
32 in superior court with respect to any decision.

33 (2) Counsel for the inmate patient shall have access to all  
34 relevant medical and central file records for the inmate patient,  
35 but shall not have access to materials unrelated to medical treatment  
36 located in the confidential section of the inmate patient’s central  
37 file. Counsel shall also have access to all health care appeals filed  
38 by the inmate patient and responses to those appeals, and, to the  
39 extent available, any habeas corpus petitions or health care related  
40 litigation filed by, or on behalf of, the inmate patient.

1 (f) The inmate patient shall be provided with a hearing before  
2 an administrative law judge within 30 days of the date of filing  
3 the petition, unless counsel for the inmate patient agrees to extend  
4 the date of the hearing.

5 (g) The inmate patient, or his or her counsel, shall have 14 days  
6 from the date of filing of any petition to file a response to the  
7 petition, unless a shorter time for the hearing is sought by the  
8 licensed physician or dentist and ordered by the administrative  
9 law judge, in which case the judge shall set the time for filing a  
10 response. The response shall be served to all parties who were  
11 served with the initial petition and the attorney for the petitioner.

12 (h) In case of an emergency, as described in Section 3351 of  
13 Title 15 of the California Code of Regulations, the inmate patient's  
14 physician or dentist may administer a medical intervention that  
15 requires informed consent prior to the date of the administrative  
16 hearing. Counsel for the inmate patient shall be notified by the  
17 physician or dentist.

18 (i) In either an initial or renewal proceeding, the inmate patient  
19 has the right to contest the finding of an administrative law judge  
20 authorizing a surrogate decisionmaker by filing a petition for writ  
21 of administrative mandamus pursuant to Section 1094.5 of the  
22 Code of Civil Procedure.

23 (j) In either an initial or renewal proceeding, either party is  
24 entitled to file one motion for reconsideration per calendar year in  
25 front of the administrative law judge following a determination as  
26 to an inmate patient's capacity to give informed consent or make  
27 a health care decision. The motion may seek to review the decision  
28 for the necessity of a surrogate decisionmaker, the individual  
29 appointed under the order, or both. The motion for reconsideration  
30 shall not require a formal rehearing unless ordered by the  
31 administrative law judge following submission of the motion, or  
32 upon the granting of a request for formal rehearing by any party  
33 to the action based on a showing of good cause.

34 (k) (1) To renew an existing order appointing a surrogate  
35 decisionmaker, the current physician or dentist, or a previously  
36 appointed surrogate decisionmaker shall file a renewal petition.  
37 The renewal shall be for an additional year at a time. The renewal  
38 hearing on any order issued under this section shall be conducted  
39 prior to the expiration of the current order, but not sooner than 10  
40 days after the petition is filed, at which time the inmate patient

1 shall be brought before an administrative law judge for a review  
2 of his or her current medical and mental health condition.

3 (2) A renewal petition shall be served on the inmate patient and  
4 his or her counsel, and filed with the Office of Administrative  
5 Hearings on the same day as it was served. The Office of  
6 Administrative Hearings shall issue a written order appointing  
7 counsel.

8 (3) (A) The renewal hearing shall be held in accordance with  
9 subdivisions (d) to (g), inclusive.

10 (B) (i) At the time the renewal petition is filed, the inmate  
11 patient shall be provided with counsel and a written notice advising  
12 him or her of all of the following:

13 (I) His or her right to be present at the hearing.

14 (II) His or her right to be represented by counsel at all stages  
15 of the proceedings.

16 (III) His or her right to present evidence.

17 (IV) His or her right to cross-examine witnesses.

18 (V) The right of either party to seek one reconsideration of the  
19 administrative law judge's decision per calendar year.

20 (VI) His or her right to file a petition for writ of administrative  
21 mandamus in superior court pursuant to Section 1094.5 of the  
22 Code of Civil Procedure.

23 (VII) His or her right to file a petition for writ of habeas corpus  
24 in superior court with respect to any decision.

25 (ii) Counsel for the inmate patient shall have access to all  
26 relevant medical and central file records for the inmate patient,  
27 but shall not have access to materials unrelated to medical treatment  
28 located in the confidential section of the inmate patient's central  
29 file. Counsel shall also have access to all health care appeals filed  
30 by the inmate patient and responses to those appeals, and, to the  
31 extent available, any habeas corpus petitions or health care related  
32 litigation filed by, or on behalf of, the inmate patient.

33 (4) The renewal petition shall request the matter be reviewed  
34 by an administrative law judge, and allege all of the following:

35 (A) The current status of each of the elements set forth in  
36 paragraphs (1) to (8), inclusive, of subdivision (c).

37 (B) Whether the inmate patient still requires a surrogate  
38 decisionmaker.

39 (C) Whether the inmate patient continues to lack capacity to  
40 give informed consent or make a health care decision.

1 (l) A licensed physician or dentist who submits a petition  
2 pursuant to this section shall not be required to obtain a court order  
3 pursuant to Section 3201 of the Probate Code prior to administering  
4 care that requires informed consent.

5 (m) This section does not affect the right of an inmate patient  
6 who has been determined to lack capacity to give informed consent  
7 or make a health care decision and for whom a surrogate  
8 decisionmaker has been appointed to do either of the following:

9 (1) Seek appropriate judicial relief to review the determination  
10 or appointment by filing a petition for writ of administrative  
11 mandamus pursuant to Section 1094.5 of the Code of Civil  
12 Procedure.

13 (2) File a petition for writ of habeas corpus in superior court  
14 regarding the determination or appointment, or any treatment  
15 decision by the surrogate decisionmaker.

16 (n) A licensed physician or other health care provider whose  
17 actions under this section are in accordance with reasonable health  
18 care standards, a surrogate decisionmaker appointed pursuant to  
19 this section, and an administrative law judge shall not be liable for  
20 monetary damages or administrative sanctions for his or her  
21 decisions or actions consistent with this section and the known  
22 and documented desires of the inmate patient, or if unknown, the  
23 best interests of the inmate patient.

24 (o) The determinations required to be made pursuant to  
25 subdivisions (c) and (k), and the basis for those determinations,  
26 shall be documented in the inmate patient’s medical record.

27 (p) (1) With regard to any petition filed pursuant to subdivision  
28 (c) or (k), the administrative law judge shall determine and provide  
29 a written order and findings setting forth whether there has been  
30 clear and convincing evidence that all of the following occurred:

31 (A) Adequate notice and an opportunity to be heard has been  
32 given to the inmate patient and his or her counsel.

33 (B) Reasonable efforts have been made to obtain informed  
34 consent from the inmate patient.

35 (C) As a result of one or more deficits in his or her mental  
36 functions, the inmate patient lacks capacity to give informed  
37 consent or make a health care decision and is unlikely to regain  
38 that capacity over the next year.

1 (D) Reasonable efforts have been made to identify family  
2 members or relatives who could serve as a surrogate decisionmaker  
3 for the inmate patient.

4 (2) The written decision shall also specify and describe any  
5 advance health care directives, POLST, or other documented  
6 indication of the inmate patient’s directives or desires regarding  
7 health care that were created and validly executed while the inmate  
8 patient had capacity.

9 (q) (1) If all findings required by subdivision (p) are made, the  
10 administrative law judge shall appoint a surrogate decisionmaker  
11 for health care for the inmate patient. In doing so, the  
12 administrative law judge shall consider all reasonable options  
13 presented, including those identified in the petition, and weigh  
14 how the proposed surrogate decisionmaker would represent the  
15 best interests of the inmate patient, the efficacy of achieving timely  
16 surrogate decisions, and the urgency of the situation. Family  
17 members or relatives of the inmate patient should be appointed  
18 when possible if such an individual is available and the  
19 administrative law judge determines the family member or relative  
20 will act in the inmate patient’s best interests.

21 (2) An ~~employee or contract~~ staff of the Department of  
22 Corrections and Rehabilitation, or other peace officer, shall not be  
23 appointed surrogate decisionmaker for health care for any inmate  
24 patient under this section, unless either of the following conditions  
25 apply:

26 (A) The individual is a family member or relative of the inmate  
27 patient and will, as determined by the administrative law judge,  
28 act in the inmate patient’s best ~~interests~~. *interests and consider the*  
29 *inmate patient’s personal values and other wishes to the extent*  
30 *those values and wishes are known.*

31 (B) The individual is a health care staff member in a managerial  
32 position and does not provide direct care to the inmate patient. A  
33 surrogate decisionmaker appointed under this subparagraph may  
34 be specified by his or her functional role at the institution, such as  
35 “Chief Physician and Surgeon” or “Chief Medical Executive” to  
36 provide clarity as to the active decisionmaker at the institution  
37 where the inmate patient is housed, and to anticipate potential  
38 personnel changes. When the surrogate decisionmaker is specified  
39 by position, rather than by name, the person occupying that  
40 specified role at the institution at which the inmate patient is

1 currently housed shall be considered and act as the appointed  
2 surrogate decisionmaker.

3 (3) The order appointing the surrogate decisionmaker shall be  
4 written and state the basis for the decision by reference to the  
5 particular mandates of this subdivision. The order shall also state  
6 that the surrogate decisionmaker shall honor and follow any  
7 advance health care directive, POLST, or other documented  
8 indication of the inmate patient's directives or desires, and specify  
9 any such directive, order, or documented desire.

10 (4) *The surrogate decisionmaker shall follow the inmate*  
11 *patient's personal values and other wishes to the extent those*  
12 *values and wishes are known.*

13 (r) The administrative law judge's written decision and order  
14 appointing a surrogate decisionmaker shall be placed in the inmate  
15 patient's Department of Corrections and Rehabilitation health care  
16 record.

17 (s) An order entered under this section is valid for one year and  
18 the expiration date shall be written on the order. The order shall  
19 be valid at any state correctional facility within California. If the  
20 inmate patient is moved, the sending institution shall inform the  
21 receiving institution of the existence of an order entered under this  
22 section.

23 (t) (1) This section applies only to orders appointing a surrogate  
24 decisionmaker with authority to make a health care decision for  
25 an inmate patient who lacks capacity to give informed consent or  
26 make a health care decision.

27 (2) This section does not apply to existing law regarding health  
28 care to be provided in an emergency or existing law governing  
29 health care for unemancipated minors. This section shall not be  
30 used for the purposes of determining or directing an inmate  
31 patient's control over finances, marital status, or for convulsive  
32 treatment, as described in Section 5325 of the Welfare and  
33 Institutions Code, psychosurgery, as defined in Section 5325 of  
34 the Welfare and Institutions Code, sterilization, abortion, or  
35 involuntary administration of psychiatric medication, as described  
36 in Section 2602.

1 (u) The Secretary of the Department of Corrections and  
2 Rehabilitation may adopt regulations as necessary to carry out the  
3 purposes of this section.

O